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In the Matter of

Review of the Commission's Regulations Governing Television Broadcasting	MM Docket No. 91-221

REPLY COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

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September 23, 1992

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SUMMARY

The arguments advanced by the National Telecommunications and Information Administration ("NTIA") and the Network Affiliated Stations Alliance ("NASA") in favor of retention of only modest changes in the dual network rule should be rejected. NBC is committed to its network-affiliate system. Any additional broadcast networks NBC develops would most likely be in cooperation with its existing affiliates, but this is because of the importance of the network-affiliate relationship and marketplace realities. The development of new broadcast network services should not be prohibited or constrained by government regulation.

NTIA's proposal to narrow the rule would continue uniquely to deprive NBC, CBS and ABC of the freedom to develop additional networks and to utilize new technologies. The consequence of this discriminatory regulation would be to place such competitive disadvantages on broadcast networking that the three networks, who are best equipped to develop new national or regional broadcast services and new broadcast technologies, will be forced to divert their companies' investments into unregulated cable program channels.

NASA predictably opposes any change in the rule because its members do not want to see their network

furnishing new program services to competing stations. But the Commission must be concerned with the public interest, not NASA members' private interests. NASA's arguments in support of the dual network rule are not supported by the factual or analytical record before the Commission, and retention of the rule would not foster the Commission's policy goals. Rather than protect diversity and competition as NASA contends, the rule exacts significant public interest costs in terms of program choice, competition and technological innovation, without any corresponding public interest benefit.

NBC reiterates its request for total repeal of the dual network rule.

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REPLY COMMENTS OF NATIONAL BROADCASTING COMPANY, INC.

I. INTRODUCTION

The Comments filed in response to the Commission's Notice of Proposed Rulemaking in this proceeding overwhelmingly favor elimination or substantial relaxation of the current structural regulation of television networks and stations. Virtually all parties support significant changes in the multiple ownership, duopoly and one-to-a-market rules, and elimination of archaic regulations affecting network station ownership patterns.

The only major exception to the uniform call for deregulation is the request by the National Telecommunications and Information Administration ("NTIA) and the Network Affiliated Stations Alliance ("NASA") to retain the dual network rule's restrictions on the ability of the three original broadcast networks to expand and diversify their broadcast programming operations. NTIA supports relaxation of the rule, but only in a manner that would continue to uniquely restrict the ability of NBC, CBS and ABC to develop alternative and competitive broadcast programming services. NASA opposes any change in the current rule.

As we argued in our main comments, there is no basis for retention of the dual network rule, and that the only effect of the rule today is to limit competition and diversity in the broadcast marketplace. Preservation of dual networking restrictions on the three original networks will force these broadcasters increasingly to focus their investments on cable programming services -- where they are free to fully exploit marketplace opportunities without regulatory constraint -- rather than on new and diverse broadcast programming services. Denying the three premiere broadcast companies the ability to invest in their core broadcast businesses, which are struggling to remain competitive against cable and other pay services, is not a regulatory policy that serves the public interest.

Commissioner Marshall recently observed that "broadcasters must become multichannel providers to continue to flourish in the long run."[1] Repeal of the dual network rule would allow both the networks and their affiliates to take advantage of new technologies to develop the kind of new and diverse channels of broadcast programming the Commissioner envisions. NBC is committed to the network-affiliate relationship which is at the core of its network business. Because of that relationship and marketplace realities, any additional broadcast networks or channels NBC develops would most likely be in cooperation with its existing affiliates. These market and business relationships should govern the development of new broadcast network services, not outdated and stifling government regulation.

In these Reply Comments, NBC will briefly respond to the contentions of NTIA and NASA regarding retention of the dual network rule.

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[1] Statement of Commissioner Sherrie P. Marshall in the Commission's proceeding on Advanced Television Systems, MM Docket 87-268, September 17, 1992.

II. NTIA'S PROPOSAL, WHICH WOULD CONTINUE TO UNIQUELY RESTRICT THE ABILITY OF THE THREE ORIGINAL NETWORKS TO DEVELOP ADDITIONAL BROADCAST PROGRAM SERVICES, SHOULD BE REJECTED

NTIA appears to agree that the dual network rule restricts the development of diverse programming services and the exploitation of emerging technologies. However, its proposal to modify the rule would continue to deprive NBC, CBS and ABC -- and only NBC, CBS and ABC -- of the freedom to develop additional networks and to utilize new technology in response to the evolving marketplace.

First, NTIA suggests that the dual network rule is overbroad and should in the future apply only to those entities covered by the Financial Interest and Syndication Rules.[2] However, as the Commission well knows, the only entities that fit the fin/syn definition of a "network" are NBC, CBS and ABC. As the three networks argued forcefully in the Commission's proceeding on fin/syn, the 15 hour test is an

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2 The Financial Interest and Syndication Rules currently apply to an entity providing more than 15 hours of prime time programming per week to interconnected affiliated stations that reach at least 75% of U.S. television households. 47 C.F.R. 73.662(i).

arbitrary threshold whose only purpose was to exempt the Fox Network from the burdens of the new fin/syn regulations. This arbitrary and discriminatory definition of a "network," which has no basis in fact or policy, should not be extended to other Commission rules.

Moreover, as Fox has argued in the appeal from the Commission's fin/syn decision,[3] the practical effect of the Commission's definition of a "network" is to discourage the growth of new networks like Fox and the launch of additional networks. Fox is deliberately holding its prime time hours to 15 to avoid the application of the Commission's fin/syn rule. The more regulatory burdens heaped on developing networks when the 15 hour threshold is crossed, the less likely these networks will ever expand their programming beyond this arbitrary weekly limit. The NTIA's proposal, which presumably is designed to foster new and diverse broadcast programming services, will, in fact, have the opposite effect in the long run.

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[3] See brief filed on August 17, 1992 by Petitioner Fox Broadcasting Company in Schurz Communications et al. v. FCC, 7th Cir. Case No. 91-2598.

Next, NTIA suggests that the dual network rule (which presumably, under the first part of its proposal, would apply only to the three original networks) be modified to allow NBC, CBS and ABC to offer additional program services only to their current line-up of affiliates. NTIA argues that if the three networks are allowed to provide additional network program services to a different group of stations, it would result in inefficient spectrum use and reduce the incentive for programming and technological innovation at the local level. On the other hand, NTIA contends, if networks offered additional programming through their existing distribution system, the benefits of innovation will be realized at both the network and the local station levels.[4]

This proposal should be rejected. First, it fails to provide the three original networks with any additional freedom to create the new and innovative services NTIA claims it wants to foster. NBC believes the current dual network rule would permit a network to develop multiple program services for its existing affiliates. As noted above, however, this joint effort should be the result of the

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[4] NTIA Comments at p. 30.

strength of the network-affiliate relationship and marketplace forces, not of government fiat. There is no reason why government should deprive the three networks of the flexibility available to every other video programmer -- the ability to develop new networks with different distribution patterns. Cable programmers, for example, can operate an unlimited number of different networks -- national basic services, national pay services, regional services, etc. They are not limited to a single distribution channel. If outdated regulation continues to restrict only broadcast networking, then broadcast networking alone will suffer competitively. The three networks, who would be best equipped to develop new national or regional broadcast services, will be forced to divert their investments in innovative program services and new technology into unregulated cable program channels.

Second, NTIA offers no analysis or explanation to support its contention that allowing networks to provide broadcast programming to stations other than their existing affiliates would lead to less innovation at the local station level. In fact, a station without a network affiliation might be equally willing to experiment with new program formats or technology than an established affiliate. Moreover, allowing networks to provide program services to more than one station in the market would foster competition in both the national and local program markets. Requiring networks to forever provide multiple channels only to their own affiliates will perpetuate difference in the competitive strength between network affiliates and, for example, independent UHF stations.

The best way to achieve the experimentation, efficiency and innovation in broadcast programming NTIA purports to seek would be to repeal the dual network rule in its entirety.

III. AFFILIATED STATIONS' CALL FOR RETENTION OF THE CURRENT DUAL NETWORK RULE SHOULD BE REJECTED

NASA predictably opposes any change in the dual network rule. While its arguments are couched in terms of the public interest, the motive of its members is obvious: existing network affiliates want the government to prohibit their network from providing programming services to competitors in their local markets. However, the private commercial interests of current affiliates do not, in this instance, coincide with the public interest goals the Commission is required to advance.

Most of NASA's arguments opposing elimination of the rule have been addressed by NBC's August 24 Comments and in earlier phases of this proceeding. Therefore, we will not undertake to answer them again in any detail. In general, these arguments do not withstand scrutiny and should be rejected as justifications for retaining this outdated and anticompetitive restriction.

First, NASA argues that the rule should be retained because the changes in the television business since 1946 have not been sufficient to warrant repeal of the rule. Clearly, this is a preposterous position. The Commission has overwhelming evidence of dramatic change in the television industry -- adduced in this and other proceedings.

Second, NASA argues that the recent relaxation of the network cable ownership rules makes retention of the dual network rule imperative in order to avoid a significant increase in network "influence." NASA posits that a network "could feasibly own three separate transmission systems [i.e., two over-the-air networks and a cable system] for the delivery of television programming in the local television marketplace," and that this would afford the networks more "control over the distribution of programming than if the networks simply owned three over-the-air networks."[5]

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[5] NASA Comments, p. 15.

NASA's contentions make little sense. NASA confuses ownership of a local distribution outlet (i.e., a television station or cable system) with the ownership of a national program service (i.e., a broadcast or cable network). Ownership of a program service does not confer increased "influence" in any local market unless the independently owned distribution outlet decides to carry the programming offered. Repeal of the dual network rule would merely allow the networks to offer new and additional broadcast program services to stations other than their existing affiliates.

Moreover, a network can currently operate a broadcast network, own certain cable systems under the modified ownership rule, and operate an unlimited number of cable networks. Networks already have the ability to offer multiple programming services (so long as only one of them was a broadcast service), and this was not affected by the recent change in the cable ownership rule, nor deemed to be a reason not to allow network ownership of cable. The Commission's only public interest concern should be that the present regulatory tilt is in favor of network investment in cable rather than broadcast program services because of the persistence of dual network restrictions.

NASA's final set of arguments state that repeal of the rule will harm competition and diversity. However, all objective analysts of the impact of this rule over the past several years have come to the opposite conclusion. For example, the Commission's Network Inquiry Special Staff determined over 12 years ago that the rule unnecessarily reduced competition and the diversity and quality of network program services.[6] The Commission's Office of Plans and Policy recently stated that

> The dual networking rules...may hinder the offering of multiple channels by a single broadcaster, and network dominance, which the rules were intended to curb, will scarcely be an issue in the future multiple-provider environment.[7]

These disinterested assessments of the adverse consequences of the dual network rule and the Commission actions that would best serve the public interest are more reliable than the claims of existing network affiliates, which are essentially based on private business concerns.

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[6] Final Report on New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Vol. I, p. 370 (1980).

[7] Broadcast Television in a Multichannel Marketplace, 6 FCC Rcd 3996, 4103 (1991).

IV. CONCLUSION

For the foregoing reasons, the Commission should reject the arguments to retain or only slightly modify the dual network rule. There is no justification for a rule that limits the development only of new broadcast networks or that uniquely disadvantages the three original networks -- the most likely investors in new broadcast program services. The rule currently exacts significant public interest costs in terms of diversity, competition and technological innovation, without any corresponding public interest benefit. NBC reiterates its call for total repeal of this outdated regulation.

Respectfully submitted,

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